

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

DAVID LANE JOHNSON,

Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE  
PLAYERS ASSOCIATION, ET AL.,

Defendants.

Civil Action No. 1:17-cv-05131-RJS

**DEFENDANT NFLPA'S REPLY MEMORANDUM  
IN FURTHER SUPPORT OF ITS MOTION TO DISMISS**

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**PRELIMINARY STATEMENT**<sup>1</sup>

Unable to plead standing or to state a claim, Johnson just shouts louder, with more invective and more hyperbole. But what's most telling about Johnson's Opposition, Doc. No. 112 ("Opp'n"), is what it does not say. There is scant discussion of or rejoinder to the legal significance of Johnson's admitted behavior that led to his suspension and fine under the PES Policy; there is not so much as an attempt to explain how Johnson could possibly state (much less prevail on) his DFR or LMRDA claims if the Court does not vacate the Award, which rejects every allegation underlying Johnson's causes of action; and Johnson neither responds to nor disputes the NFLPA's legal showing that Johnson bears an "enormous" burden to plead his hybrid DFR claims, for which judicial review is "highly deferential, recognizing the wide latitude that [unions] need for the effective performance of their bargaining responsibilities."<sup>2</sup>

By now, Johnson's tactic is clear: plead the kitchen sink, inject inflammatory accusations and conspiracy theories for good measure, and hope that somewhere, somehow, the Court will divine a claim. But no such claim exists. And insofar as the NFLPA has not addressed every single allegation in Johnson's 345-paragraph, 57-page FAC (Doc. No. 39), it is because—apart from page limits—the vast majority of his allegations are irrelevant to the elements of Johnson's claims.

Needless to say, the NFLPA disputes Johnson's false allegations and attacks on the Union. But even if taken as true, Johnson would still lack standing and a viable legal claim. The FAC's claims against the Union should be dismissed with prejudice.

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<sup>1</sup> The NFLPA uses the same defined terms herein as in its moving brief, Doc. No. 109 ("Mot.").

<sup>2</sup> *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991) (second quotation); *Dillard v. Seiu Local 32BJ*, No. Civ. 4132(CM), 2015 WL 6913944, at \*4 (S.D.N.Y. Nov. 6, 2015) (first quotation).

## ARGUMENT

### **I. IF THE AWARD IS UPHOLD, JOHNSON CANNOT STATE ANY CLAIM**

Arbitrator Carter considered and rejected the vast majority of the FAC allegations that Johnson relies upon to try to state a claim, *e.g.*, Johnson’s arguments about missing lab protocols and CBA “side deals,” because, even if true, they “did not materially affect the accuracy or reliability of the test result.” Award ¶¶ 6.21-6.42. The principal exception is Johnson’s allegations about arbitrator bias and selection—because he never presented, and therefore waived, these arguments. *See* NFLPA Opp’n to Mot. to Vacate, Doc. No. 113 (incorporated-by-reference); *see also* NFL Opp’n to Mot. to Vacate, Doc. No. 111.<sup>3</sup> Most significantly, the Award holds that Johnson admitted to and committed a violation of the PES Policy, thus causing all of his own claimed injuries. Award ¶¶ 6.43-6.59. Accordingly, if the Court does not vacate the Award, its final and binding judgment will leave nothing of Johnson’s claims against the NFLPA.

In that vein, Johnson cannot—and does not—deny any of his testimonial admissions from the incorporated-by-reference arbitral record, *i.e.*, that he (twice) deliberately ingested a “non-FDA approved,” “liquid form” substance, provided by an unidentified “friend,” “a few days” before he “tested positive.” Mot. at 5-7.<sup>4</sup> So he instead summarily recycles, in three bullet points, his

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<sup>3</sup> While the NFLPA agrees that courts reviewing labor arbitrations may consider the arbitrator’s evident partiality (Opp’n at 12), such an argument must be preserved. *See Williams v. NFL*, 582 F.3d 863, 865-66 (8th Cir. 2009) (rejecting claims of arbitrator bias because Union failed to object to arbitrator’s authority to hear appeal under the PES Policy, thereby waiving the argument). Johnson failed to do so. And his argument that Arbitrator Carter did not have “the authority to determine his own jurisdiction” (Opp’n at 11-12) is off-the-mark—Johnson did not present below or in the FAC any issue about Carter’s “jurisdiction.” As for bias, arbitrators always have the authority to determine whether to recuse themselves if such a claim is presented. *See Marc Rich & Co., A.G. v. Transmarine Seaways Corp. of Monrovia*, 433 F. Supp. 386, 387 (S.D.N.Y. 1978).

<sup>4</sup> Johnson’s “I don’t agree with the test” testimony is just a regurgitation of his counsel’s objection that the test was “invalid.” Opp’n at 3; Arb. Tr. 90:20-91:9. Johnson does not deny that he knowingly ingested an unidentified, unregulated substance a few days before testing positive.

conclusory arguments about why Arbitrator Carter should nonetheless have granted his appeal. Opp’n at 4. Again, however, Arbitrator Carter considered and rejected each of these arguments. *See* Award ¶¶ 6.1-6.42. Johnson has *no* other response to the fact—evident from the arbitral record—that he alone is responsible for his suspension and financial penalties because he ingested a substance banned by the PES Policy. He thus cannot plausibly plead causation either for purposes of standing or for stating the elements of his DFR and LMRDA claims.

That is not all. Even if this were not the unusual case where Johnson’s DFR and LMRDA claims are carbon copies of his rejected arbitration claims, Johnson concedes that a breach of the DFR must “seriously undermine[] the integrity of the [arbitral] process” to “remove[] the bar of finality from the award.” Opp’n at 11. In other words, in any Section 301/DFR hybrid action, the plaintiff-employee must plausibly aver that the union’s purported conduct “contributed to” an “erroneous decision.” Mot. at 15-17. Johnson cannot do so here, further dooming his claims. In sum, if this Court declines to vacate the Award, the claims against the NFLPA must be dismissed.

## **II. JOHNSON FAILS TO PLEAD STANDING UNDER RULE 12(B)(1)**

Even if the Award were not vacated, Johnson would still lack standing to pursue any of his claims against the NFLPA. In response to the Union’s legal showing that Johnson’s injuries are not “fairly traceable” to the NFLPA’s alleged conduct, Johnson states that the NFLPA “grossly mischaracterizes” his injuries which “include more than just those resulting from the erroneous Award.” Opp’n at 5, 6. Johnson then goes on for several pages without actually identifying any such injury *other than* the suspension and financial penalties that the Award sustained. *Id.* at 5-8.

Johnson chastises the NFLPA for “cherry-pick[ing]” and “disregarding” certain subsections from his Prayer for Relief: (a) (declaratory judgment), (b) (judgment), (d)/(e) (removal from reasonable cause testing and return to pre-discipline status under PES Policy), (h) (punitive damages), (i)/(j) (attorneys’ fees). *Id.* at 5. Upon inspection, however, these subsections reveal

no alleged injuries that are untethered to the disciplinary penalties sustained by the adverse Award. Similarly, Johnson supplies a chart purportedly “trac[ing] the NFLPA’s misconduct to some of Johnson’s injuries.” *Id.* at 9-10. But everything in the “Resulting Injury” column merely concerns reasons why Johnson believes he lost the arbitration and suffered the disciplinary consequences (*e.g.*, the NFLPA allegedly undermined his defense in the arbitration).<sup>5</sup>

Johnson’s gripes about the Chief Forensic Toxicologist (“CFT”) position exemplify the legal fallacy underlying his standing and injury claims. *See id.* Johnson argues he was injured by the NFLPA’s failure to provide him with a copy of the “side agreement” relating to the position of the CFT because “[n]o positive test and no valid discipline exist absent certification of the test results by the CFT per the Policy.” *Id.* at 10.<sup>6</sup> Johnson, however, does not even try to articulate a nexus between not having a piece of paper setting forth the NFL’s and NFLPA’s agreement to a replacement for Dr. Finkle and losing his arbitral appeal after admitting to ingesting a banned substance. (Not to mention, taken to its logical conclusion, Johnson’s (implausible) contention is that following Dr. Finkle’s retirement, *no player in the NFL* could violate the PES Policy because *only* Dr. Finkle may certify failed drug tests.)

Johnson’s two-versus-three available arbitrators argument suffers from the same dispositive legal defect. Even *if* the existence of two arbitrators constituted a technical violation of the PES Policy (which would have been for an arbitrator—not this Court—to decide in the first

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<sup>5</sup> Johnson also claims reputational damage, but any such damage came from Johnson’s PES Policy violations and his own admissions that he took a banned substance. If he had prevailed on his appeal, and the Policy violation was expunged, there would be no ostensible reputational harm.

<sup>6</sup> Johnson does not dispute that Dr. Finkle—the designated CFT under the PES Policy—retired, and that the NFL and NFLPA agreed on an interim basis to have another person fulfill that role. Indeed, this is the “secret agreement” he complains about not receiving—even though the NFL’s lawyer proffered its existence on the record. *See* Disc. Hr’g Tr., Doc. No. 113-1 at 59:3-62:8.

instance), Johnson cannot plausibly allege that he would have prevailed on his appeal if there had been three arbitrators in the rotation. The PES Policy provides that *one* arbitrator presides over appeals, and individual players have no right to choose which arbitrator conducts that player's appeal—arbitrators “automatically” are assigned. *See* Policy at 13. Moreover, the Policy affords arbitrators no disciplinary discretion when a violation is found. *See id.* at 10, 16. As such, Johnson cannot plausibly establish that his injuries are “fairly traceable” to any arguable, “technical” defect concerning the number of available arbitrators. Simply put, no matter which arbitrator was assigned to Johnson's appeal, he would have had no choice but to find a PES Policy violation given Johnson's admissions and to impose the mandatory penalty set forth in the Policy. *Id.*

Finally, to the extent that Johnson (erroneously) argues that the LMRDA required disclosure of certain documents he (allegedly) lacked, he would still be wrong that “[a] plaintiff suffers an injury in fact when he fails to obtain information that must be disclosed pursuant to a statute.” Opp'n at 6. The Supreme Court in *Spokeo, Inc. v. Robins* squarely held that “Article III standing requires *a concrete injury* even in the context of a statutory violation.” 136 S. Ct. 1540, 1549 (2016) (emphasis added); *see also* *McFarlane v. First Unum Life Ins. Co.*, No. 16-CV-7806, 2017 WL 3495394, at \*7 (S.D.N.Y. Aug. 15, 2017) (there must be “‘no reason to doubt’ that the information would help plaintiff within the meaning of the statute”) (citation omitted). These principles bring Johnson's lack of standing to assert any of his claims against the Union back into focus. Johnson must allege facts to show “a concrete injury” “fairly traceable” to the alleged misconduct. And no matter the volume or intensity of Johnson's gripes, he cannot overcome his own testimonial admissions (or the Award) to plausibly establish standing in this action.<sup>7</sup>

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<sup>7</sup> Johnson's reference to the *Elliott* case (Opp'n at 8) ignores two critical points. First, unlike Johnson, Elliott categorically denied the accusations against him, rendering the challenges to the

### III. JOHNSON FAILS TO STATE ANY CLAIM AGAINST THE NFLPA

#### A. Johnson Fails to State a DFR Claim

Johnson does not dispute that, to plead a viable DFR claim, he has an “enormous burden” to plausibly plead facts of arbitrary, bad faith, or discriminatory conduct. *See* Mot. at 14-22. Nor does Johnson deny that judicial review of union conduct is “highly deferential.” *See id.* The FAC does not come close to satisfying any of these requirements. And the Court should reject out-of-hand Johnson’s argument (Opp’n at 16) that because DFR claims may present factual issues (like every other kind of claim) they therefore are immune from Rule 12(b)(6) dismissal. *See, e.g., Roy v. Buffalo Philharmonic Orchestra Soc’y, Inc.*, 682 F. App’x 42 (2d Cir. 2017) (dismissing DFR claim in hybrid action under Rule 12(b)(6)); *see also* Mot. at 16-17 (collecting cases).

#### 1. Johnson Does Not Plausibly Plead Causation or That the NFLPA Contributed to an Erroneous Decision

Johnson does not deny that, to plead a DFR claim in a Section 301 hybrid action such as this one, he must allege that the DFR violation contributed to the arbitrator making an erroneous decision against him. *See* Mot. at 15-16 (collecting cases). Even outside of “hybrid” claims, DFR claims require plausibly alleging a “causal connection between the union’s wrongful conduct and [plaintiff’s] injuries.” *Id.* at 14-15 (citation omitted). Accordingly, Johnson’s DFR claims fail under Rule 12(b)(6) for the same reason—no causal nexus between the alleged Union misconduct and Johnson’s alleged injuries—as all of his claims fail under Rule 12(b)(1).

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arbitral process in *Elliott* fundamentally different from Johnson’s complaints. Even if Johnson’s allegations about the arbitration were true, they would not have caused his injuries from the adverse Award. Second, whatever Johnson wants to make of the NFLPA’s argument that Elliott satisfied subject matter jurisdiction when he challenged his suspension before the award was issued, the argument was rejected by the Fifth Circuit and the NFLPA’s complaint was dismissed. *NFLPA v. NFL*, No. 17-40936, 2017 WL 4564713 (5th Cir. Oct. 12, 2017).

## 2. Johnson Pleads *No* Facts of Retaliation or Discrimination

Another fundamental problem with the FAC is that virtually every type of alleged Union misconduct would, if true, apply to the NFLPA's entire membership: *all* players had two not three available PES Policy arbitrators; *all* players had tests certified by someone other than the CFT after he retired; *all* players had the same level of access to copies of the PES Policy, the alleged "side agreements," and the lab protocols; *all* players would have been subject to alleged PES Policy amendments purportedly unratified under the NFLPA Constitution; and on-and-on. The FAC does not aver otherwise. Not only is such universally applicable Union conduct, by definition, not "retaliatory" or "discriminatory" *against Johnson*, it is utterly implausible that Policy-wide conduct could be arbitrary or in bad faith. To conclude otherwise, the Court would have to accept the premise that the NFLPA—whose existential purpose is to represent all NFL players—is acting arbitrarily and in bad faith towards its *entire* membership. This is implausible as a matter of law, especially considering the contrary premise of the FAC that the NFLPA has some kind of (non-existent) vendetta against Johnson. At bottom, all of Johnson's complaints amount to a second-guessing of the NFLPA's administration of the PES Policy, which is beyond the reach of judicial review as a matter of law. *See id.* at 21-22.

## 3. Johnson Pleads No Facts of Collusion

Unlike the rest of Johnson's allegations, colluding with the NFL would actually amount to a DFR claim. Yet Johnson does not deny that, in this Circuit, pleading collusion requires specific allegations found nowhere in the FAC. *See id.* at 18-19. Moreover, the object of the supposed conspiracy would be *all* NFL players given the nature of the alleged conspiratorial acts (*e.g.*, conspiring with the NFL to "actively facilitat[e]" PES Policy violations, Opp'n at 22).<sup>8</sup> This

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<sup>8</sup> With respect to Johnson's argument that the NFLPA's purported silence at the arbitral hearing

conspiracy theory is thus both implausible and pled insufficiently.

#### 4. Alleged Union Constitution Violations Do Not State a DFR Claim

In search of a viable claim, Johnson now emphasizes his argument that the NFLPA violated the DFR by entering into “side agreements” with the NFL in alleged violation of its Constitution. This contention is neither supported by the FAC allegations nor the law.

*First*, Johnson claims that so-called “side agreements” were not approved by the NFLPA’s membership in violation of the NFLPA Constitution. *See id.* at 16-18 (citing FAC ¶¶ 113-122). But the very provision Johnson cites and incorporates by reference provides that:

Nothing in this Section or in this Constitution shall prohibit the Executive Director, in consultation with the President, from entering into side letters and/or other documents . . . [that] are necessary for the orderly implementation and administration of a Collective Bargaining Agreement.

Mot. to Vacate, Ex. 22, Doc. No. 116-22, § 6.05. Johnson ignores this clear provision and does not allege that the NFLPA Executive Director did not authorize the purported “side letters.” *See* FAC ¶¶ 113-122. As such, even taking his allegations as true, Johnson has not pled a breach of the NFLPA Constitution.

*Second*, even if Johnson *had* pled facts of a breach of the NFLPA Constitution, that would not amount to a DFR claim. Johnson’s own case law confirms as much. In *Spellacy v. Airline Pilots Ass’n Int’l*, the Second Circuit rejected the argument that a union’s alleged violation of its constitution—by allowing the employer to amend the CBA without a written agreement—was a violation of the DFR. 156 F.3d 120, 128 (2d Cir. 1998). The court further rejected plaintiffs’ DFR claims based on the union’s “secret agreements” with the employer. *Id.* at 128-29. In doing so, the court distinguished the very cases Johnson relies on (*Tuscan* and *Aguinaga*) where the

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evidences collusion, he offers no conspiratorial *facts*, while omitting that he retained his own legal team to represent him during the arbitration.

agreements at issue “vitiating clear contractual rights of the employees” who were “tricked into believing that their rights were preserved until it was too late to protest the employer’s action.” *Id.*

*Spellacy*, by contrast, found no DFR breach because the union members there were able to “hire[] attorneys to file grievances,” and therefore preserve their rights. *Id.* at 129. The same logic applies here, where Johnson had his own lawyers process his arbitral claim. Moreover, Johnson cites *Tuscan* for the “important distinction between a negotiated modification of an agreement’s terms and an unstated ‘modification’ intended to apply *only to selected individuals*.” Opp’n at 18 (quoting *Lewis v. Tuscan Dairy Farms*, 25 F.3d 1138, 1143 (2d Cir. 1994)) (emphasis added). But that is the point: Johnson alleges no such discriminatory “modification intended to apply only to selected individuals.” *Id.*

#### **5. Johnson’s Remaining Allegations Fail to State a DFR Claim**

*First*, Johnson alleges that the NFLPA failed to investigate Johnson’s discipline and “coerced Johnson to waive his rights under the 2015 Policy.” FAC ¶ 279 (cited in Opp’n at 19). But Johnson *did* exercise his appeal rights under the PES Policy and his additional arguments about the NFLPA purportedly failing to review the positive test results to help him (Opp’n at 19) similarly fall short when Johnson hired his own legal team to do that. This case is nothing like the typical DFR case—including those upon which Johnson relies—in which a union declines to process the plaintiff’s grievance *at all*. See, e.g., *Caputo v. Nat’l Ass’n of Letter Carriers*, 730 F. Supp. 1221 (E.D.N.Y. 1990). Here, Johnson processed the grievance on his own, making any decision by the Union not to provide duplicate representation—even if that were true—well-within its broad discretion as a matter of labor law.

*Second*, Johnson’s argument that the NFLPA breached its DFR by refusing to respond to Johnson’s discovery requests ignores that *the PES Policy* controlled discovery matters. Johnson made a discovery motion before Arbitrator Carter and simply does not like the outcome. This is

just another attack on the arbitration—not a viable DFR claim.<sup>9</sup>

### **B. Johnson Fails to State a LMRDA Claim**

Reading Johnson’s Opposition, one would think he did not have the PES Policy at the time of his arbitral appeal. *See* Opp’n at 25 (“How can Johnson adhere to a policy or be disciplined under a policy he does not have?”). But putting aside that the NFL distributes such player policies each year,<sup>10</sup> Johnson’s attorneys cited their “well-worn copy of the Policy” extensively at the arbitration. Arb. Tr. 19:15-21; *see also id.* 29:21-30:4, 199:13-25, 204:11-205:3, 207:7-24, 217:23-218:23. The FAC lays bare that Johnson’s real contention is not that he did not have the PES Policy at all, but that he did not receive copies of alleged “side agreement” modifications. This position, however, fails as a matter of law. *See* Mot. at 24-25.

### **C. Johnson Fails to State a Declaratory Judgment Act Claim**

Johnson concedes that he must show a likelihood that he “will be injured in the future” to state a Declaratory Judgment claim (Opp’n at 13) and argues he is injured “[w]ith every reasonable cause test.” *Id.* Even putting aside that the reason Johnson remains subject to reasonable cause testing is because he violated the PES Policy, a cognizable injury comes into play only if *he* violates the PES Policy for a third time. Johnson’s own public pronouncements that he will “try to not make any more dumb decisions” (*see* Mot. at 7) contradict any likelihood of future injury, and certainly no claim of future injury that can be causally traced to NFLPA conduct.

## **CONCLUSION**

All Counts against the NFLPA should be dismissed with prejudice.

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<sup>9</sup> Johnson’s citation to NLRB decisions for refusing to provide discipline-related information (Opp’n at 20 n.9) is especially ironic since, here, the NLRB *dismissed* Johnson’s Complaint.

<sup>10</sup> *See Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n*, 820 F.3d 527, 538 (2d Cir. 2016) (policies “distributed to all NFL players at the beginning of each season”).

Dated: November 8, 2017

Respectfully submitted,

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